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IN THE SUPREME COURT FOR THE STATE OF ALASKA

KEVIN MEYER, in his official capacity as Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections, and the STATE OF ALASKA, DIVISION OF ELECTIONS, Petitioners, v. ROBERT CORBISIER, Executive Director of ALASKA STATE COMMISSION FOR HUMAN RIGHTS ex rel. B.L., Respondent.	Supreme Court Case No. **S-18442**

Trial Court No. 3AN-22-06525CI

RESPONSE TO PETITION FOR REVIEW

COMES NOW Respondent, Robert Corbisier, Executive Director of Alaska State Commission for Human Rights ("ASCHR" or "the Commission") *ex rel*. B.L., by and through undersigned counsel, and files its response to the Petition for Review filed by Respondents ("the Division").

The Commission filed an application for a temporary restraining order ("Application") against the Division based on the Division's discriminatory practices of failing to provide reasonable opportunities for visually-impaired voters to exercise their right to independent and private franchise. The only options the Division put in place — aside from suggesting that visually-impaired voters enlist a third party to mark their ballot for them — are only available to voters in seven (mostly urban) communities or those with access to the required technology (including a computer, screen reader, email, and printer) and the precarious assistance of a third party. Neither of these options guarantee a visually-impaired voter the reasonable opportunity to their fundamental right to vote pursuant to the protections of federal and state law, including specifically the Americans with Disabilities Act (the "ADA") and the Rehabilitation Act. Where the Division has — and continues — to discriminate and effectively disenfranchise a population of voters on the basis of their disability, the law requires that it must be ordered to cease such a practice immediately, without regard to the "cascading" consequences which the Division emphasizes will upset the very election in which these disabled voters will be precluded from participating.

I. TIMELINE AND PROCEDURE

The Commission does not have independent or conflicting information regarding the timeline that the Division sets forth generally describing the special election timeline and the specific statutes relating thereto. For the sake of the Application and Response, it is relevant that the Division became aware of the necessity of a special primary election in March 2022, following the death of Congressman Don Young. At some point, the Division determined that the election

would have to occur via mail-in ballot.[1] In constructing its timeline, the Division's considerations included its obligation under federal law to print and send ballots to overseas and military voters.[2]

The Division also determined that it would allow voters access to local voting locations so they could vote "absentee in-person."[3] The Division advertises on its website that visually-impaired voters may use the voting tablets in federal elections "at polling places and regional division offices."[4]

And yet it was not until mid-May, when the ASCHR and B.L. met with the Division to discuss the available voting options for the visually-impaired, that the Division disclosed that the voting tablets — which are otherwise regularly available locally during elections — would only be available to visually-impaired voters at a handful of locations.[5] After a few weeks of trying, and failing, to explore other acceptable options with the Division — including a rejected proposal to place voting tablets at every voting location, consistent with the Division's practices in every other election — ASCHR filed this suit, asking the Division to fulfill its obligations under state

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1 Affidavit of Gail Fenumiai ("Fenumiai Aff.") at ¶ 4.

2 Petition at p. 2.

3 Fenumiai Aff. at ¶ 6.

4 *See* ASCHR Reply in Support of Application for Temporary Restraining Order at p. 8 and Exhibit D thereto.

5 Affidavit of R. Corbisier ("Corbisier Aff.") at ¶¶ 3-5; Affidavit of B.L. ("B.L. Affidavit") at ¶¶ 8-9; Fenumiai Aff. at ¶ 26.

and federal law to provide reasonable options for the visually impaired such that they could vote privately and independently.[6]

II. THE TRIAL COURT PROPERLY ISSUED A PRELIMINARY INJUNCTION BASED ON THE DIVISION'S DISCRIMINATORY CONDUCT AND LACK OF AVAILABLE DEFENSES OR INJURY TO PUBLIC INTERESTS

In response to ASCHR's Application, the Division primarily argues that requiring the Division to make voting reasonably accessible to members of the visually-impaired voting community would serve to upset the imminent special primary election. But it is not a legitimate defense to a preliminary injunction issued on the basis that a state actor is discriminating to claim irreparable harm will occur without further continued discrimination.

To the extent the trial court's decision to issue a preliminary injunction was based on conclusions of law, ASCHR recognizes the Court will review these on a *de novo* basis.[7] The trial court's decision to issue the preliminary injunction in light of these conclusions is reviewed on an abuse of discretion basis.[8] For the following reasons, the Division's Petition should be denied because the Division's conduct, and arguments, disregard its federal obligations to the visually-impaired population as well as its duties to facilitate and protect the exercise of protected civil rights for all voters.

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6 Corbisier Aff. at ¶¶ 6-13; B.L. Aff. at ¶¶ 13-18.

7 *State v. Galvin*, 491 P.3d 325, 332 (Alaska 2021).

8 *Id*.

A. The Commission's Evidence Sufficiently Established Irreparable Harm to Visually-Impaired Voters Due to the Lack of Reasonable and Accessible Voting Options

The Division claims that ASCHR failed to present adequate assertions of harm showing that any voter was precluded from casting a private ballot. As a preliminary matter, this misstates the applicable standard: a plaintiff need not show that any individual has been actually harmed, or wait until an individual has suffered actual harm before seeking injunctive relief, but may apply for an injunction against the threatened infringement of their rights.[9]

The Commission filed suit on the basis that the Division was engaging in unlawful discrimination on the basis of federal and state laws. The test for a discriminatory practice in the election realm is not whether a voter is precluded from effectively casting a ballot at all, as the Division problematically suggests. Rather, a discriminatory practice exists where a government enacts a voting scheme that does not allow individuals with disabilities to participate to the same degree as non-disabled voters.[10]

To this end, ASCHR submitted substantial evidence in support of its Application. In addition to providing demonstrative evidence showing the difficulty in navigating the Division's website, and the confusing and contrary information presented therein — including an inference that voting tablets (recognized by both parties as an accessible and private voting option for the visually-impaired) would be available at all in-person locations — ASCHR provided testimonial evidence describing the hardships that a

[9] *Costa Mesa City Employees Assn. v. City of Costa Mesa*, 209 Cal.App.4th 298, 305 (2012).

[10] *See, e.g., Taliaferro v. N. Carolina State Bd. of Elections*, 489 F.Supp.3d 433, 436 (E.D.N.C. 2020).

visually-impaired person experienced when attempting to access the Division's options and instructions for visually-impaired voters.[11]

The Commission also presented undisputed evidence that it was not until May 14, 2022, that it learned at a meeting with DOE representatives that only five voter tablets were intended to be available at five sites across the State of Alaska.[12] When the Division modified the website on June 8, 2022, just three days prior to the end of the election, identifying seven locations where a total of 10 such tablets would be available, it tacitly acknowledged that the Division had not proffered any reasonable prior notice to the public.[13] The Division minimizes the fact that voter tablets are typically available at well over 100 in-person voter locations, stating that the handful of tablets available for this election, "covers the majority of Alaskans."[14] The Division offers no facts in support of this assertion, and on the contrary, evidences the dismissive manner it has regarded the threat to the fundamental voting rights of the vision-impaired community affected by its decisions.

The Commission submitted additional testimony and exhibits demonstrating that the "online ballot delivery" method did not provide an adequate alternative as another accessible and private option. Again, ASCHR provided screenshots showing the difficulty navigating the site to request an online ballot, and the printed instructions and materials that needed to be completed with carefully-exercised choreography prior to being mailed

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11 Exhibits D-F, attached to ASCHR's Reply; B.L. Aff. at ¶¶ 10-13; Corbisier Aff. at ¶¶ 10-12.

12 B.L. Aff. at ¶ 9; Corbisier Aff. at ¶ 5.

13 Fenumiai Aff. at ¶ 31; Exhibit G, attached to ASCHR's Reply.

14 Petition at p. 8.

or physically returned to the Division.[15] Testimony that supported ASCHR's position in this regard included the testimony from Ms. Fenumiai herself, whose description of the process shows that it is burdensome on its face, as well as testimony from B.L. explaining the hurdles she had accessing the site, attempting to improve the video/audio instructions, and the typical incompatibilities experienced by a blind or visually-impaired voter, such as not having access to a printer.[16]

Finally, in the election realm, a voter's loss of ability to cast a ballot is always considered to be "irreparable harm," considering that it represents a fundamental right.[17] Affected visually-impaired voters will have no adequate remedy at law because neither the diversion of resources nor the infringement on the fundamental right to vote can be redressed by money damages or other traditional legal remedies.[18]

B. The Superior Court did Not "Underestimate" the Harm to the State Where the Alternative Requires a Continuation of Discriminatory Practices

The Division argues that the Court erred by allowing "speculative hardship to a few to drown out the Division's plea that the public interest requires the election to proceed on schedule."[19] This offensive argument, which encourages the Court to ignore the fundamental rights of the visually-impaired voters where otherwise inconvenient for the general voting population, is exactly the type of repugnant discriminatory election conduct

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15 Exhibits C-E, attached to ASCHR's Application and Reply.

16 Fenumiai Aff. at ¶¶ 13-15; B.L. Aff. at ¶¶ 10-12.

17 *See, e.g., League of Women Voters of N.C. v. North Carolina,* 769 F.3d 224, 247 (4th Cir. 2014) ("[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury") (collecting cases).

18 *Id.* at 247 ("[O]nce the election occurs, there can be no do-over and no redress").

19 Petition at p. 7.

that this state and the nation have roundly rejected for the balance of the last century. And widespread jurisprudence dismissing similar arguments could not be clearer on this issue: there is no public interest in the perpetuation of unlawful state action.[20] The Division cannot claim that it must effectuate the state election statutes regardless of its continuing discrimination, because its unlawful behavior and disregard for the fundamental rights of visually-impaired voters cannot legally be considered to be in the best interest of the public. Contrary to the Division's assertion that the public interest is best served by enforcement of the State's laws, the public interest does not lie with enforcement of those state procedures which violate the laws which Congress has passed to prevent discrimination based upon disability.[21]

C. ASCHR has Established it Will Succeed on the Merits, Where the Division Failed to Present a "Reasonable Accommodation" and the Application of a State Law may Not Violate Federal Law under the Supremacy Act

The Commission presented significant evidence that the "online ballot" was not a reasonable option for the visually-impaired, and that it deprived visually-impaired, would-be voters of the opportunity to participate in a voting program that was equal to that afforded to others. Despite the weight of this evidence, the Division argues that other

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20 *See, e.g., League of Women Voters of United States v. Newby,* 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action"); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *G&V Lounge, Inc. v. Michigan Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights"); *Martinez-Brooks v. Easter*, 459 F.Supp.3d 411, 448 (D. Conn. 2020) (As an initial matter, "the public interest is best served by ensuring the constitutional rights of persons within the United States are upheld"); *see also N. Carolina State Conference of NAACP v. Cooper*, 430 F.Supp.3d 15, 53 (M.D.N.C. 2019) ("electoral integrity is enhanced, not diminished, when all eligible voters are allowed to exercise their right to vote free from interference and burden unnecessarily imposed by others").

21 *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 508 (4th Cir. 2016).

courts have accepted an online ballot as a reasonable accommodation, so the Court may do so here. In doing so, it cites to Fourth and Sixth Circuit decisions approving such an option as a reasonable accommodation, both of which are readily distinguishable from the present set of circumstances because they were discussed in the context of absentee ballots which were offered *in addition to* traditional in-person polling. In particular, in *Lamone*,[22] the "online ballot" option was approved in conjunction with a comprehensive election scheme in the small state of Maryland, which otherwise made available to its visually-impaired voters nearly 2,000 polling places; there the court noted that "the overwhelming majority of these polling places are . . . staffed with election judges trained in serving voters with disabilities. The polling place voting machines have a number of accessibility features designed to assist disabled voters in casting their ballots."[23] Where the Division is not providing any meaningful opportunity to access voting tablets to the majority of the communities throughout the state, citing the approval of the "online ballots" in wholly different contexts is simply not persuasive.

The Division's position also disregards the strength of ASCHR's supremacy clause argument. Where federal law (and in this case at least two, the ADA and the Rehabilitation Act) prohibits discrimination against visually-impaired voters, the State cannot use its own laws to justify their violation. Where there is controversy between a federal and state law and they cannot co-exist without a violation, it is the state law that is subject to legal compromise — certainly not the fundamental rights of the citizens who are caught in the middle, as the Division suggests. As ASCHR discussed at length in its

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22 *Id*. at 498-99.

23 *Id*.

June 10 Reply brief filed with the trial court, this rule and protection is all the more forceful in the context of the ADA, where "[r]equiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does."[24]

D. An Imminent Election Is Not an Independent Justification to Disregard Discriminatory Practices Affecting Voters' Fundamental Rights

The Division next cites the "magnitude" of the harm to the public interest if the special election is affected by a ruling enjoining its continuing discriminatory practices. In doing so, the Division argues that "even if a plaintiff has shown irreparable harm and a probability of success on the merits," the impending election is just too significant of an event and the Court should allow the election to occur despite the Division's voter disenfranchisement and discrimination.

The Division does not cite any law on point for this unfortunate argument; each of its cited cases are easily distinguishable. In *Sw. Voter Registration Educ. Project v. Shelley*,[25] the Ninth Circuit declined to issue a preliminary injunction where the plaintiffs argued that the use of a punch-card ballot machine in certain California counties contributed to a possible dilution of votes, due to machine error. And in both *State, Div. of Elections v. Metcalfe*,[26] and *State v. Galvin*,[27] this Court declined to permit preliminary injunctions after candidates raised claims relating to ballot access or identification as candidates under the Alaska constitution. None of these cases involved state actors unlawfully and directly discriminating against a class of disabled voters, and none of these

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[24] *Lamone*, 813 F.3d at 508-09 *quoting Jones v. City of Monroe, MI*, 341 F.3d 474, 487 (6th Cir.2003).

[25] 344 F.3d 914, 916 (9th Cir. 2003).

[26] 110 P.3d 976, 977 (Alaska 2005).

[27] 491 P.3d 325 (Alaska 2021).

cases involved the clear and strict mandates of the ADA. This case is far more analogous to the Court's decision in *State v. Arctic Village Council,*[28] where even under a non-federal or ADA standard, this Court approved the issuance of a preliminary injunction despite "the Division's concerns about last-minute suspension of election laws" and the Division's argument that "because [the plaintiffs] sued too late . . . their claims [were] barred by laches."[29]

E. The Superior Court's Order is Not Impermissibly Vague, given ASCHR's Proposed Voting Accommodations and the Division's Existing and Continuing Legal Obligations to the Visually-Impaired

The Division's argument that it cannot determine from the trial court's order what additional steps it must take to comply, or "what actions the State could take without risking contempt," is wholly inconsistent with the pleadings and arguments it made in this case. For example, the Division agrees in no less than five places in its briefing that voter tablets provide an accessible option which permit a blind or visually-impaired voter to maintain the secrecy to which they are entitled, and acknowledges that ASCHR repeatedly sought to have more tablets deployed to the absentee in-person voting locations during the run-up to this lawsuit. In other words, it is not that the Division does not know what actions would ensure compliance with the law, it is that it continues to restate the same tired mantra: "love to, but can't." Again, the Division is completely ignoring the well-established law that prohibits it from using a state law (Ballot Measure 2, with its mandated election timelines), the implementation of which results in discrimination (because the Division cannot offer the same access to voter tablets in the shortened-time

28 495 P.3d 313, 316 (Alaska 2021).

29 *Id*. at 320.

frames) as a shield from having to comply with federal law that protects a visually-impaired voter's fundamental right to a secret ballot process.[30]

What Plaintiff asserted, and what Judge Gandbhir inherently recognized and afforded to the Division, was that there might be alternatives to deploying more voting tablets — that is, other adequate means or mechanisms that would similarly enable blind or visually-impaired voters to cast a secret ballot. While at least some ideas have been openly advocated to the Division, including a bi-lateral electronic ballot system (one which a voter can reasonably access, vote/mark electronically, and return electronically) the trial court's order merely recognized the Division's legal responsibility, within its expertise, to find a specific remedy that provides a vision-impaired voter with a reasonable opportunity to vote independently and privately. The is a definitive order, and not simply an order to "follow the law," as the DOE suggests.[31]

III. CONCLUSION

For the reasons articulated herein, and the law and arguments presented in the trial court supporting ASCHR's Application, it respectfully requests the Court deny the Division's request to grant its Petition and reverse the finding of the trial court.

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30 *Nat'l Fed'n of the Blind, Inc. v. Lamone*, 438 F.Supp.3d 510, 526–27 (D. Md. 2020).

31 DOE's citation to *Cook Inlet Fisherman v. State Dept. of Fish and Game*, 352 P.3d 789 (Alaska 2015) is devoid of analogy where Court denied a preliminary injunction, and noted that the relief requested was that the Department merely "follow the law."

DATED this 11th day of June, 2022.

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CERTIFICATE OF TYPEFACE

Pursuant to Alaska R. App. P. 513.5(c), the foregoing has been prepared in a proportionally-spaced 12.5-point Arial typeface.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of June, 2022, a true and correct copy of the foregoing was served via electronic delivery on the following:

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